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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 139

UNITED AIR LINES, INC.,

Petitioner,

vs.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
Case No. R-1706	4
The Brotherhood Application	6
The Form of the Ballot	8
Proceedings in the Courts Below	9
Summary of Argument	13
Argument	20
Introduction	20
I. United Has a Substantive Interest in the Composition of a Unit of Employees With Which It May Be Required to Bargain Under the Railway Labor Act and Is Therefore Entitled to Procedural Due Process in the Manner by Which the Unit Is Determined	23
A. United's Interest in the Craft or Class	24
B. The Constitutional Right	26
II. By Accepting Without Independent Inquiry the Bargaining Unit Agreed Upon by Two Unions, the Mediation Board Failed to Exercise the Duty Imposed Upon It Under the Railway Labor Act	31
A. The Statutory Plan	31
B. The Arbitrary Exercise of the Board's Duty	36
C. Carrier Participation in Prior Representation Proceedings	40
D. Conclusion	43

III. The Switchmen's Union Case Is No Bar to Requiring the Mediation Board to Provide a Fair Procedure 44

IV. The Form of the Board Ballot Contravenes the Express Provision of the Railway Labor Act That a Majority of the Employees Shall Have the Right to Determine the Representative of the Craft or Class 47

Conclusion 55

Appendix 59

CITATIONS.

Cases.

Air Line Stewards and Stewardesses Ass'n v. National Mediation Board, 294 F. 2d 910 (C. A. D. C., 1961), cert. den. 369 U. S. 810 (1962) 46

Atchison, Topeka and Santa Fe Ry. Co. v. Summerfield, 229 F. 2d 777 (C. A. D. C., 1955), cert. den. 351 U. S. 926 (1956) 21

B. F. Goodrich v. FTC, 208 F. 2d 829 (C. A. D. C., 1953) 21

Bowles v. Willingham, 321 U. S. 503 (1944) 27, 30

Carter v. Carter Coal Co., 290 U. S. 238 (1936) 29

City of Chicago v. Atchison, Topeka & Santa Fe Railway Co., 357 U. S. 77 (1958) 20

Columbia Broadcasting System v. United States, 316 U. S. 407 (1942) 21

Fay v. Douds, 172 F. 2d 720 (C. A. 2, 1949) 45

Friend v. Lee, 221 F. 2d 96 (C. A. D. C., 1955) 21

General Committee v. M.-K.-T. R. Co., 320 U. S. 323 (1943) 17, 46

Greene v. McElroy, 360 U. S. 474 (1959) 21

Inland Empire Council v. Millis, 325 U. S. 697 (1945) .. 30

Interlake Corp., 4 NLRB 55 (1937) 48

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951) 16, 21, 40

Jordan v. American Eagle Fire Insurance Co., 169 F. 2d 281 (C. A. D. C., 1948) 27

La Cross Telephone Corp. v. Wisconsin Employment Relations Board, 336 U. S. 18 (1949) 27

Leedom v. Kyne, 358 U. S. 184 (1958) 54

McNulty v. National Mediation Board, 18 F. Supp. 49 (N. D. N. Y., 1936) 53

National Motor Freight Traffic Ass'n v. United States, 372 U. S. 246 (1963) 21

NLRB v. Ideal Laundry and Dry Cleaning Co., 330 F. 2d 712 (C. A. 10, 1964) 30, 44

NLRB v. Jones & Laughlin, 301 U. S. 1 (1937) 28, 44

Opp Cotton Mills v. Administrator, 312 U. S. 126 (1941) 27

Perkins v. Lukens Steel Co., 310 U. S. 113 (1940) 27

Pittsburgh Plate Glass Co. v. NLRB, 313 U. S. 146 (1941) 28-9, 44

Premier Peat Moss Corp. v. United States, 147 F. Supp. 169 (D. C. N. Y. 1956), aff'd per curiam 355 U. S. 13 (1957) 21

Shields v. Utah Idaho Central R. Co., 305 U. S. 177 (1938) 27

Southern Pilots Ass'n v. C. A. B., 323 F. 2d 288 (C. A. D. C., 1963), cert. den. 376 U. S. 954 (1964) 30-31

Switchmen's Union v. National Mediation Board, 320 U. S. 297 (1943) 17, 22, 30, 33-4, 44-6, 55-6

Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks, 281 U. S. 548 (1930) 28

UNA Chapter, FEIA v. National Mediation Board, 294 F. 2d 905 (C. A. D. C., 1961), cert. den. 368 U. S. 956 (1962) 37, 38, 46, 55

Virginian Railway Co. v. System Federation, 300 U. S. 515 (1937) 18, 23, 26, 28, 47, 54

WES Chapter, FEIA v. National Mediation Board, 314 F. 2d 234 (C. A. D. C., 1962) 46

NMB Determinations.

Case No. R-3639 (December 5, 1963) 6, 38, 43
Case Nos. R-3712, 3713, 3714 43
Case No. R-1706, 1 NMB Determinations 423 (1947) 4, 5, 38-9, 40
Case No. R-2107, 2 NMB Determinations 19 (1948) 34
Case No. R-2357, 2 NMB Determinations 66 (1953) .. 5
Case No. C-2946, 3 NMB Determinations 56 (1961) 36-7
Case No. R-3445, 3 NMB Determinations 87 (1960) ... 41, 42
Case No. R-3479, 3 NMB Determinations 94 (1961) 41
File No. C-2098, 3 NMB Determinations 1 (1953) 42
File No. C-2139, 3 NMB Determinations 9 (1953) 41
File No. C-2252, 3 NMB Determinations 16 (1956) 5, 41
File No. C-2380, 3 NMB Determinations 20 (1955) 41
File No. C-2389, 3 NMB Determinations 16 (1956) 5, 41
File No. C-2783, 3 NMB Determinations 49 (1959) 41

Statutes.

Federal Aviation Act of 1958:
Section 401(k) (4), 72 Stat. 737, 49 U. S. C. § 1371 23
Railway Labor Act:
Section 2, Fourth, 48 Stat. 1187, 45 U. S. C. § 152 Fourth 18, 32, 47, 49, 54
Section 2, Ninth, 48 Stat. 1188, 45 U. S. C. § 152 Ninth 31, 32, 33, 34, 35, 49
Wagner Act:
Section 7, 49 Stat. 452 49
Section 9(a), 49 Stat. 453 48-9

Miscellaneous.

Administration of the Railway Labor Act by the National Mediation Board, 1934-57 (1958) 35, 48

First NLRB Annual Report (1936) 48

Second NLRB Annual Report (1937) 48

29th NMB Annual Report (1963) 35, 52

Majority Vote Under the Railway Labor Act, 40 Op. A. G. 541 (1947) 49

Legislative History:

S. Rep. No. 573 on S. 1958, 74th Cong. 1st Sess. 1935 33

H. Rep. No. 969 on H. R. 7978, 74th Cong. 1st Sess. 1935 33

Hearings on H. R. 7650, House Comm. on Interstate and Foreign Commerce, 73d Cong. 2d Sess. 1934 ..... 32, 50

Hearings on S. 3266, Sen. Comm. on Interstate Commerce, 73d Cong. 2d Sess. 1934 50

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BRIEF FOR PETITIONER UNITED AIR LINES, INC.

This case was consolidated for argument and decision in the Court of Appeals with Nos. 138 and 369. The three cases were also consolidated in this Court in the orders granting the petitions for writs of certiorari. The National Mediation Board and its members are respondents in this case and petitioners in No. 369. The Board has filed a consolidated brief in the three cases, and this brief will stand as the opening and reply brief for petitioner United Air Lines.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 146-154)[1] is reported at 330 F. 2d 853. The order of the District Court (R. 144) is not reported. There was no opinion by the District Court.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered on March 12, 1964 (R. 156). Petition for rehearing was denied on April 14, 1964 (R. 157). The petition for a writ of certiorari was filed on June 1, 1964, and was granted on October 12, 1964 (R. 158). Jurisdiction is conferred on this Court by 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. The National Mediation Board refused to hold a hearing at the request of United on the question of the appropriate craft or class of United's employees among whom an election was to be held to determine a representative for bargaining under the Railway Labor Act. The stated reasons for the refusal were that the Board did not consider United to be a party in interest on the question and that the labor organizations involved had agreed on the unit. The Board took no evidence on the craft or class question, and accepted the agreement of the labor organizations without independent inquiry. The questions presented are:

   a. Does a carrier have a constitutional right of due process to be heard by the Mediation Board on the craft or class issue?

   b. May the Board, in the exercise of its duty under the Railway Labor Act, make a craft or class deter-

1. References are to the record in No. 139. Any reference to the separate consolidated record in Nos. 138 and 369 will be specifically noted.

mination arbitrarily by accepting the division of employees agreed upon by interested labor organizations without consideration of any other criteria?

c. Does a carrier have judicial standing to raise the foregoing questions?

2. The form of ballot used in a representation election by the Mediation Board does not permit an eligible employee to cast a valid ballot for no representation. Does this form of ballot violate the mandate of the Railway Labor Act that the majority of employees in the craft or class have the right to select the representative for the craft or class?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Involved are the Fifth Amendment to the United States Constitution and Sections 2 Fourth and Ninth of the Railway Labor Act, 48 Stat. 1187-88, 45 U. S. C. § 152. These provisions are printed as an Appendix to this brief.

STATEMENT.

United is a certificated air carrier subject to regulation under the Federal Aviation Act of 1958 (72 Stat. 737, 49 U. S. C. § 1301), and the Railway Labor Act (48 Stat. 1185, 45 U. S. C. § 151). It employs approximately 32,000 persons. Of these, approximately 4,500 are office and clerical employees such as typists, stenographers, file clerks, electronic computer and office machine operators, receptionists and telephone operators; approximately 5,100 are public contact employees, such as reservation and ticket sales agents, vacation booking agents, passenger agents and station agents; and approximately 3,100 are ramp and stores employees, who, among other duties, load, stow, unload, pick-up and deliver cargo, baggage and food, on, to and from aircraft at ramps and terminals, clean aircraft, maintain the ramp

area and equipment, and perform storeroom work (R. 15-16, 106-08).

The office-clerical and public contact personnel at United have never been organized for collective bargaining purposes. However, the ramp and stores employees have been organized as a separate group for over 20 years, and since 1948 have been represented by the International Association of Machinists ("IAM") (R. 16). On Capital Airlines, however, which in 1961 was merged into United, all three groups of employees had been represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Brotherhood") in a single bargaining unit or "craft or class." (R. 103.)

Case No. R-1706.

The combined craft or class at Capital arose out of a 1947 Mediation Board proceeding in which the Board found after hearing that the "clerical" craft or class of the railroads (consisting of all three groups described above) should be extended to the four air lines—not including United—in the case before it.[2]

The Board noted in its original determination that the "commercial airline industry is relatively new . . ." and "while there has been considerable development in collective bargaining in this field, there is but little uniformity among the several major airlines in the manner employees in the occupations here involved have aligned themselves for collective bargaining purposes." *Case No. R-1706*, 1 NMB Determinations 423, 432 (1947).

2. The airlines were National, Northeast, Mid-Continent, and Pennsylvania Central, the predecessor of Capital. The NMB brief correctly notes that United, which participated in the proceeding, supported that finding in 1947 (pp. 7-8), but fails to state that as early as 1949 United advised the Board that because of subsequent organizational developments the R-1706 determination would not be practical at United. R. 29, 57-58.

This determination was issued in January 1947, and was immediately attacked by the IAM and other labor organizations. The Board then held further hearings and in April 1947 reaffirmed its original determination with this admonition:

> "This affirmation should not be construed to prevent a reexamination of the craft or class provisions of the Railway Labor Act as applied to these categories of employees in any future air line representation disputes when, in the judgment of the Board, such reexamination will further the purposes of the Act." 1 NMB Determinations 445 (1947).

In 1953 the Board, in another craft or class determination, observed that five years had elapsed since its 1947 decision in R-1706 and stated:

> "In view of this and because of the expansion and growth of the airline industry during this period, as well as the development of representation of airline employees, the Board is of the opinion that upon proper application for its services under Section 2 Ninth [of the Railway Labor Act], at the appropriate time under its rules, it will be advisable to reexamine the determination in Case R-1706 et al., with the view of making such modifications as may be found to be justified at that time." *Case No. R-2357*, 2 NMB Determinations 66, 67 (1953.)

And in 1956 the Board did reexamine its R-1706 determination. It found that the entire "clerical" craft or class was represented as a single unit on only six airlines, while on 24 carriers—including American, Eastern, Pan American, Northwest, TWA and United—the R-1706 determination was not being followed. The Board then found as appropriate in the cases before it a separate craft or class of stock and stores employees, classifications formerly included within the catch-all of R-1706. *Case Nos. C-2252, C-2389*; 3 NMB Determinations 16 (1956).

As recently as December 1963—long after this litigation was started—the Board again refused to follow the 1947 R-1706 determination, and directed a separate election among a group of Eastern Air Lines employees over the contention of the IAM (a participant in the case) that the employees were part of the R-1706 classification. And despite the position of the Board in this case that a carrier cannot be a party to a craft or class proceeding, Eastern fully participated in that case. *Case R-3639*, December 5, 1963.

The Brotherhood Application.

On August 24, 1962, after the United-Capital merger, the Brotherhood invoked the services of the Board to investigate a representation dispute among United's "clerical, office, stores, fleet [ramp] and passenger [public contact] service" employees, excluding, however, those ramp and stores employees hired by United prior to August 24, 1962 (R. 31). The Brotherhood was apparently willing to leave the excluded employees to the IAM, which had represented them as a separate group since 1948, but wanted to include the ramp and stores employees hired after August 24, 1962 (who would otherwise be represented by the IAM). The Brotherhood application was docketed as NMB Case No. R-3590.

The IAM did not look kindly upon the Brotherhood's attempt to represent employees whom the IAM considered as its own and objected to the Brotherhood's application for Board services on the ground that it did not conform to the Board's 1947 determination. The Brotherhood charged that the IAM was "collaborating with the management," and in turn the IAM claimed the Brotherhood application was "a raid against the IAM." As a result the Brotherhood amended its application to cover the entire

"clerical" craft or class including all the ramp and stores employees represented by the IAM, whether hired before or after August 24, 1962 (R. 43, 47, 51, 138). The IAM accepted the challenge.

The Board, without further factual inquiry, acquiesced in the unit to which the two unions had agreed, although it was also apparently willing to proceed with an election among only the groups not previously represented by the IAM if the two unions would have agreed to that (R. 135, 138, 142). The bargaining unit thus created would have lumped together United's most highly skilled technical white collar employees and its least skilled common labor employees, including janitors. United's skilled blue collar workers—its mechanics—are members of a separate craft or class.

When the Brotherhood first invoked the Board's services, the Board also asked United to submit any statement it cared to make. In reply, United noted the Brotherhood's exclusion of employees represented by the IAM as of the date of the application, and asked the Board to dismiss the application. United added that if the Board should not dismiss the application, it "should then hold a public hearing to determine whether or not the proper craft or class is that expressed in prior determinations by the Board, or whether the proper craft or class is something other than that previously determined by the Board" (R. 39).

On January 11, 1963, after the Brotherhood amended its application, United again asked the Board to hold a hearing on the craft or class question. United called attention to the fact that on most airlines the R-1706 determination that all of these groups constituted a single craft or class had not been followed either on the carriers or by the Board (R. 55). The Board denied this request and a subsequent request for reconsideration, explaining that

the "two organizations which are parties to the dispute are in agreement . . ." (R. 71). The reasons assigned by the Board for its denial were:

> ". . . that the Carrier [United] is not a party to this matter, and also . . . that neither of the organizations who are parties to this case [IAM and Brotherhood] have made any request for a hearing on the question of craft or class. The Board, therefore, denied the request of United for such a hearing." (R. 99.)

The Form of the Ballot.

Concurrently with the correspondence relating to the matter of a hearing on the craft or class question, United requested the Board to alter its customary form of ballot to permit an employee to vote for "no union." United's request was based on legislative history, which it cited to the Board, showing that Congress intended employees subject to the Railway Labor Act to be free to vote for or against representation, and also on the analogy of the practice under the National Labor Relations Act which embodies the same statutory scheme (R. 73).

The form of ballot which the Board has used in the past and which it had planned to use in the United election does not contain space for a "no representation" vote as does the ballot used by the National Labor Relations Board (R. 101). The Mediation Board's practice is to provide space to vote only *for* the labor organization or organizations seeking representation rights, and an additional space to vote for "any other organization or individual" (R. 81).

A Mediation Board election is valid only if a majority of the eligible voters cast valid ballots. A majority of the valid ballots cast is sufficient to elect a representative. A ballot is valid only if cast *for* a representative. A ballot upon which is written "no representative" or which is cast blank by the voter is voided (R. 7). There is no way

for an individual employee opposed to representation by any union effectively to indicate his wishes, since if at least a majority of employees do vote, his failure to vote simply reduces the number of votes needed to elect a representative. The Board's form of ballot makes it possible for a minimum of 25% plus one of the employees to elect a bargaining representative for the entire craft or class, despite the desire of a majority of employees not to be represented by the labor organization so elected (R. 7-8).

The Board declined to change its form of ballot, stating that "introduction of a 'yes' or 'no' ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees. . . ." (R. 86).

On February 7, 1963, the Board wrote to United: "The Board will proceed with an election among the employees concerned in NMB Case No. R-3590 under the Board's usual policies and procedures in such cases." (R. 98.)[3]

Proceedings in the Courts Below.

United filed its complaint four days later, alleging in the first count, that it had been deprived of its rights under the Railway Labor Act and the due process clause of the Constitution by the Board's arbitrary and capricious acceptance of whatever craft or class was agreed upon by the labor organizations involved, and by the Board's refusal

3. Effective November 23, 1964, the Board changed its form of ballot to include a legend under the heading "Instructions for Voting," that "No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified." This change was announced in a memorandum of November 6, which stated that the change was made "after consultation with the Solicitor General of the United States." This change does not cure the violation of the Railway Labor Act complained of here. See *infra*, pp. 47-55. (NMB Brief, 63-65.)

to hold a hearing addressed to the craft or class issue in which United as a party could produce evidence demonstrating the inappropriateness of the Board's craft or class determination (R. 4). The second count alleged that the form of ballot which the Board insisted on using was inconsistent with the employer's statutory duty to treat with the representative chosen by the majority of a craft or class of its employees, and invaded its right not to be required to bargain for a craft or class with a representative not desired by the majority (R. 6).

The complaint alleged that the composition of a craft or class of employees for collective bargaining purposes affected valuable property rights of an employer in the conduct of its business, and that the combining of the 12,700 employees performing work in many different and unrelated classifications, such as electronic computer operators, ticket agents, and cleaning women, into a single craft or class would have a substantial and adverse impact on the operations and cost of conducting United's business (R. 5).

The complaint sought to restrain the Board from holding the election unless the form of ballot was corrected and United was given a hearing as to the proper scope of the bargaining unit. The complaint did not seek judicial review of any substantive determination as to the scope of the unit, but only to compel the Board to make the determination in accordance with the requirements of the statute and of due process. Federal jurisdiction was based on 28 U. S. C. §§ 1331 and 1337.

Following the filing of the complaint, United moved for a preliminary injunction (R. 11), and the Board moved to dismiss the complaint or for summary judgment (R. 110). Affidavits were filed by both parties in support of their respective motions (R. 14, 103, 106, 111, 135, 142).

The District Court (per Judge Matthews) granted the Board's motion for summary judgment, and dismissed the complaint in a brief order which did not state any reason for the court's action and which found only that "there is no genuine issue of material fact." (R. 144.)

Shortly after the dismissal of United's complaint, a group of United employees filed a complaint in the District Court against the Mediation Board which attacked the form of ballot and the Board's refusal to grant the employees a hearing on the craft or class question. The Brotherhood intervened in support of the position of the Mediation Board. Judge Youngdahl issued a permanent injunction restraining the Board from conducting an election with a form of ballot which does not permit a voting employee to cast a vote against representation, and remanded to the Board for further consideration the employees' request for a hearing on the question of the appropriateness of the craft or class. *Association for the Benefit of Non-Contract Employees* v. *National Mediation Board*, 218 F. Supp. 114 (Dist. Col., 1963).

United appealed from the dismissal of its complaint in this action, and the Board and Brotherhood appealed from the judgment entered by Judge Youngdahl. The three appeals were consolidated in the Court of Appeals. In a *per curiam* opinion, that Court affirmed the decision of Judge Youngdahl in the employees' suit, and also affirmed the dismissal of United's complaint in this case (R. 146).

The Court of Appeals noted that the grounds for dismissal of United's complaint were not stated in the district court's order, but stated that "as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed." The Court then stated:

". . . The close question as to United's standing,

about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the District Court's dismissal, because our decision in the other two cases affords the relief concerning the form of ballot which United sought." (R. 148.)

United petitioned for rehearing (R. 157), pointing out that although the action of the Court of Appeals in affirming Judge Youngdahl's order may have resolved the ballot question it left completely unanswered the issues relating to United's right to be heard on the craft or class question and the Board's duty in making such a determination. The petition requested the Court, therefore, to decide the "close question" of United's standing. This petition was denied on April 14, 1964 (R. 157).

SUMMARY OF ARGUMENT.

Although it has been assumed that United's complaint was dismissed on the ground that United "lacks standing to maintain this action," the government brief agrees that the question whether a carrier has a right to participate in National Mediation Board craft or class determination "is presented for decision in this litigation." United's complaint asserted that the craft or class determination affected valuable property rights, was made arbitrarily without hearing, and hence was a denial of its right to due process; accordingly a clear basis for judicial standing was asserted.

I.

The Railway Labor Act imposes an enforceable obligation on a carrier to bargain with a representative chosen by a majority of its employees in a craft or class determined under the statute. Compliance with the Railway Labor Act is a condition of holding a certificate of public convenience and necessity by an air carrier under the Federal Aviation Act of 1958. United has a direct and substantial interest in the scope of the craft or class, and is entitled to procedural due process in the manner by which it is determined.

A. Combining the three diverse classifications of office-clerical employees, public contact employees, and ramp and stores employees into a single bargaining unit will have a substantial and adverse impact on United's operations and cost of doing business. Such a unit would include such unrelated jobs as computer operators, ticket agents, and cleaning women. The hiring qualification and duties for

each of the three general categories differ. There is no cross-training, cross-utilization or community of interest among them. Such a unit is inconsistent with the Mediation Board's own statement that the craft or class should reflect "the functions, duties and responsibilities of the employees" and the "community of interest between jobs." The manner in which the employees are grouped affects bidding and transfer rights and where the classifications are unrelated, may require constant retraining and utilization of employees not hired for or qualified for jobs into which they exercise these rights. The experience of Capital Airlines with this diverse craft or class demonstrates that the potential harmful impact on a carrier is not speculative.

B. Since United does have a substantial property interest in the composition of the bargaining unit, and since its statutory duty to bargain with a representative for such a unit is judicially enforceable, United is entitled to procedural due process in the method by which such bargaining unit is determined.

Prior decisions of this Court have recognized an employer's constitutional right in regulations affecting its labor relations, including determinations of bargaining units.

There is no administrative enforcement procedure in which this right can be protected, no statutory provision for judicial review of the craft or class determination, and no opportunity to challenge the determination in an enforcement proceeding before the Civil Aeronautics Board under the Federal Aviation Act of 1958. Accordingly, the requisite due process can only be satisfied before the Mediation Board in the initial proceeding establishing the craft or class.

II.

A. Although the Railway Labor Act does not define the phrase "craft or class," the legislative history of the 1934 amendments which added the election procedures to the Act, and of the Wagner Act adopted in the following year, makes clear that the duty to determine crafts or classes was imposed on the Mediation Board. It was not the intent of the Railway Labor Act to give to employees the right to determine their own bargaining units, but only the right to select a representative for the bargaining unit once it was determined. The government contention that this was a right given employees is, in any event, irrelevant, since agreement here was by opposing labor organizations, which even together may not represent the agreement of all or a majority of the employees. The Board was unwilling to consider the views of either United or the unorganized employees.

B. The Board did not make a determination of craft or class in this case on the basis of any evidence or findings. It accepted the craft or class agreed upon between the two unions and refused United's request for a hearing for the expressly stated reasons that neither of the two competing labor organizations had requested a hearing and because in the Board's opinion United "is not and cannot be a party to this representation dispute."

The Board position confuses the issue of the breadth of the craft or class with the identity of the representative of that class once the unit is determined. The former determination is the duty of the Board; the latter is the right of the majority of the employees. The courts have recognized and the Mediation Board has insisted upon this distinction in prior craft or class litigation. It has told this Court that Congress has charged the Board with the "duty to find the craft or class to be

whatever it is, not what it used to be." For this reason, the Board's claim that it did exercise its independent judgment and discretion in this case because it adhered to a 1947 craft or class determination does not demonstrate a discharge of its obligation as it itself has defined it. It has not in the past adhered to the 1947 determination, and when it has heard evidence—including that of carriers—has modified its position in prior cases. Its non-reliance on the 1947 determination is further evidenced by the fact that the Board was willing, as the record shows, to consider a different craft or class in this case if the two rival labor organizations had agreed to that. The Board's determination was, therefore, an "arbitrary fiat," and not the "result of a process of reasoning." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 136 (1951).

C. The government's assertion of a prior consistent construction of the Railway Labor Act by the Board as precluding carrier participation is not supported by past Board action. Employers participated in ten of the eleven air carrier craft or class determinations reported by the Board from July 1953 to June 1961. In the eleventh case it had been stipulated that the result would be the same as in a companion case in which the carrier did participate. In a number of these cases the only participants were a single labor organization and the carrier. In others, the Board clearly separated the question of craft or class from that of identity of the representative of the craft or class, a distinction it ignores here.

D. Employees and labor organizations have no greater rights under the Railway Labor Act respecting the craft or class question than does a carrier. There is no statutory or constitutional basis for the Board's refusal to hold a hearing on that question because the two labor organizations agreed on the craft or class.

III.

Switchmen's Union v. *National Mediation Board*, 320 U. S. 297 (1943), is no bar to the relief sought here. That case held that craft or class determinations of the Mediation Board are not subject to judicial review. United does not seek judicial review of the substantive merits of a Board craft or class determination, but only a declaration that the Board must make that determination on the basis of evidence and in accordance with United's right to procedural due process. *Switchmen's Union* reserved constitutional questions: "all constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." 320 U. S. 297, 301. United's right was not created by Congress, but rather was limited by Congress; hence even if judicial review were sought here *Switchmen's Union* would be no bar. This Court also stated, the same day it decided *Switchmen's Union*, that it was not then deciding whether judicial power may be exerted to require the Mediation Board to exercise its duty under Section 2 Ninth of the Railway Labor Act—the statutory provision here involved. *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 336 n. 12 (1943). This case involves the Board's obligation under the Constitution and the statute to exercise its duty to make a craft or class determination and to use fair procedures in so doing. *Switchmen's Union* does not prevent the exercise of judicial power to compel the Board to act.

IV.

The Mediation Board ballot does not provide a space for an employee to cast a valid ballot for no representation. The Mediation Board contends that he can express this desire by not voting at all since not voting is equivalent to voting no.

Section 2 Fourth of the Railway Labor Act provides that the majority of any craft or class of employees shall have the right to determine the representative of the craft or class. Certification of a representative on the basis of a majority of the votes cast, rather than a majority of the total eligible voters, was upheld on the ground that the non-voters are "presumed to assent to the expressed will of the majority of those voting." *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937). Thus the Mediation Board contention that not voting is equivalent to voting no is completely contrary to the rationale of the *Virginian* case that not voting is equivalent to assenting to the will of the majority of those voting.

The National Labor Relations Board has allowed space for a "no" vote since the *Virginian* case. The relevant provision of the Wagner Act was modeled after Section 2 Fourth of the Railway Labor Act. The Wagner Act provision was re-enacted by Congress in 1947 without change after ten years of consistent NLRB practice of allowing a "no" vote, while Congress has had no occasion to look at Section 2 Fourth since 1934. The purpose of the two statutes is the same—the encouragement of collective bargaining—and the difference in treatment is not explicable on that ground.

The form of ballot was changed by the Mediation Board on November 23, 1964, after consultation with the Solicitor General, to include on its face a legend that the employee need not vote, and that no representative will be certified unless a majority of the eligible employees participate. The government brief describes the prior form of ballot as "unfair." The change, however, does not cure the basic defect, since until it is possible for an employee to cast a ballot for no representation, no valid conclusions about the desires or presumed desires of a majority of the employees can be drawn from the results of a Board-conducted elec-

tion. For non-voting cannot at the same time be presumed to be the equivalent of voting no and of assenting to the will of the majority of those who do vote. If the Board thinks now that not voting is the equivalent of voting no, it should place a space on its ballot for such an expression and end what it must think is litigation of a pointless issue.

ARGUMENT.

INTRODUCTION.

One of the grounds asserted by the Board in its motion to dismiss United's complaint was that United "lacks standing to maintain this action." (R. 110.) Although Judge Matthews' order dismissing the complaint stated no reasons, it was assumed by the Court of Appeals that this ground of lack of judicial standing was the basis for her action (R. 148). Judge Youngdahl made the same assumption in his memorandum opinion in support of his order granting a preliminary injunction in Nos. 138 and 369 (R. Nos. 138 and 369, 133 Fn. 1).

The courts below accepted the argument that United had no judicial standing to challenge the Board's position that an employer subject to the Railway Labor Act lacks administrative standing to be heard on the question of craft or class. This effectively blocked any judicial examination of the propriety of the Board's evaluation of its own obligation under the Act as well as the merits of United's complaint that its constitutional right to procedural due process was being violated by the Board.

The judicial standing argument really "confuse[d] the merits of the controversy with the standing . . . to litigate them." *City of Chicago* v. *Atchison, Topeka & Santa Fe Railway Co.*, 357 U. S. 77, 83 (1958). For how could it ever be determined if the Board was right or wrong in its position on United's administrative standing—*i.e.*, United's right to be heard on craft or class questions—if United had no judicial standing to litigate the question?

United's complaint alleged that the craft or class determination by the Board affected valuable property rights

in the conduct of its business and that it was made arbitrarily and capriciously, without hearing or consideration of its effect on United, and was a denial of United's right to due process (R. 3-10). Thus a clear basis for judicial standing was stated. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407 (1942); *National Motor Freight Traffic Ass'n.* v. *United States*, 372 U. S. 246 (1963).[4]

In its brief to this Court, the government now seems to agree that United has the right to present to a court the question of its administrative standing. ". . . We agree with United that the question whether a carrier has a right to participate in employee representation proceedings under Section 2, Ninth of the Act is presented for decision in this litigation." (NMB Brief, 43-44.) The characterization "employee representation proceedings" begs the issue somewhat, since one of the questions here is whether a craft or class determination is solely a matter of employee interest. The government states it more accurately in its Questions Presented as "whether a carrier has a right to participate in a National Mediation Board representation proceeding." (NMB Brief, 2.)

On the merits of the issue of United's right to be heard before the Board on craft or class questions, the government offers two basic but contradictory arguments. First, it says that the Railway Labor Act leaves the determination of craft or class questions exclusively to the employees, hence the employer has no legally recognized interest which entitles it to be heard on the question (NMB Brief, 44-45).

4. See also *Greene* v. *McElroy*, 360 U. S. 474 (1959); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951); *Atchison, Topeka and Santa Fe Ry. Co.* v. *Summerfield*, 229 F. 2d 777 (C. A. D. C., 1955), cert. den. 351 U. S. 926 (1956); *Friend* v. *Lee*, 221 F. 2d 96 (C. A. D. C., 1955); *B. F. Goodrich* v. *FTC*, 208 F. 2d 829 (C. A. D. C., 1953); *Premier Peat Moss Corp.* v. *United States*, 147 F. Supp. 169 (D. C. N. Y., 1956), aff'd per curiam 355 U. S. 13 (1957).

The implicit conclusion, though one which the Board has never explicitly stated, is that since the Brotherhood and IAM agreed on a craft or class in this case, the matter is at an end and the Board itself has no function in the process and no legal interest of United has been affected. The government argument does not explain, however, why the agreement of two labor organizations necessarily reflects the agreement of the affected employees. The second argument is that the Board did in fact meet the obligation imposed upon it by the Railway Labor Act to make craft or class determinations and decided "to adhere to the craft lines drawn in 1947." (NMB Brief, 60.) The conclusion from this is that such a determination by the Board is not subject to judicial review under the doctrine of *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943) (NMB Brief, 60).

The Board does not discuss the constitutional question raised in United's petition.

We shall argue with respect to the craft or class question that United has a constitutionally protected right to procedural due process in the manner by which its employees are grouped for collective bargaining purposes; that the Railway Labor Act is consistent with this right in that it does not delegate to employees the power to make craft or class determinations but imposes that duty on the National Mediation Board; that the National Mediation Board did not exercise its duty here, and that *Switchmen's Union* is no bar since United seeks only the right to have the Board hear and consider its evidence respecting the appropriate craft or class of its employees, and is not seeking judicial review of any substantive determination of the Board.

With respect to the ballot issue, we will demonstrate that the form of ballot used by the Board does not assure

that the desires of a majority of the employees will be, or can reasonably be presumed to be, reflected in the results of a Board-conducted election, and therefore is inconsistent with the majority rule principle established by the Railway Labor Act.

I.

UNITED HAS A SUBSTANTIVE INTEREST IN THE COMPOSITION OF A UNIT OF EMPLOYEES WITH WHICH IT MAY BE REQUIRED TO BARGAIN UNDER THE RAILWAY LABOR ACT AND IS THEREFORE ENTITLED TO PROCEDURAL DUE PROCESS IN THE MANNER BY WHICH THE UNIT IS DETERMINED.

The federal labor relations statutes require that an employer bargain with a representative chosen by a majority of its employees in a bargaining unit or craft or class determined under the statute, under compulsion of legal sanctions. This obligation is enforceable under the National Labor Relations Act through a statutory enforcement procedure and under the Railway Labor Act through the general judicial equity power. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937). A certificated air carrier—like United—is subject to further sanctions since compliance with the Railway Labor Act is a condition of holding a certificate of public convenience and necessity under Section 401(k)(4) of the Federal Aviation Act of 1958. 72 Stat. 756-7, 49 U. S. C. § 1371(k).

United's position is that the direct and substantial interest of an employer in the composition or structure of a collective bargaining unit of its employees entitles the employer to procedural due process in the manner by which the unit is determined. This right has always been accorded to employers subject to the National Labor Relations Act and, as we will show, there is no inherent difference between that statute and the Railway Labor Act in

this respect. The source of this right is not statutory but constitutional since an employer—like any person—has the right to be free of arbitrary restraint in the pursuit of its business and in its freedom of contract.

This is not to argue—nor do we—that United is not subject to federal regulation of its labor relations, nor that it may not be required to bargain with a representative selected by a majority of its employees in a craft or class determined under the Railway Labor Act. We do contend that such regulation must be consistent with procedural due process, and that the Mediation Board may not impose a craft or class upon United arbitrarily or capriciously.

A. United's Interest in the Craft or Class.

United's substantial interest in the craft or class is clearly established by the record here. The complaint and affidavits are unchallenged, and Judge Matthews found there was no genuine issue of material fact (R. 144).

United's complaint alleged that the composition of a craft or class of employees for collective bargaining purposes affects valuable property rights of United in the conduct of its business, and that the combining of employees in such unrelated classifications as electronic computer operators, ticket agents and cleaning women into one craft or class will have a substantial and adverse impact on the operations and cost of conducting United's business (R. 5). United's affidavits detailed how such a craft or class is inconsistent with its organizational structure, and the effect such a craft or class would have on the business of United, its efficiency and its ability properly to perform its public service function.

There are different hiring qualifications for each of the groups. Ramp and stores employees are primarily male,

their duties involving essentially physical labor; they need not have the training and education required of clerical or public contact employees. The clerical personnel are primarily female, perform little physical work and rarely deal with the public. Public contact employees are of either sex and their work requires personality and appearance standards which are not relevant to the clerical or ramp and stores employees. There is little inter-group identification and no community of interest, cross-training, or cross-utilization among them. Combining these diverse classifications—totaling 12,700 employees located in 100 cities throughout the country—into a single bargaining unit tends to impair the morale of the higher rated employees, and disrupts the company's organizational efficiency (R. 16-17, 24-26, 106-108). Such a unit conflicts with the Mediation Board's own statement that the craft and class should reflect "the functions, duties and responsibilities of the employees," and the "community of interest existing between jobs." (R. 28.)

In the courts below, the Board did not deny the existence of these problems or attempt to minimize them. It acknowledged that United would be "exposed to hard bargaining which may increase its labor costs and complicate its personnel problems." NMB Brief in Court of Appeals, 33. It suggested that United could solve these problems through the manner in which it negotiated a collective bargaining agreement. But the obligation to bargain collectively with the entire craft or class as a single unit makes remote the possibility that the employer can preserve a rational personnel structure. For the very concept of "craft or class" implies community of interest among the employees in the unit. Its effect is to make the employer's organizational structure conform to the "craft or class" rather than the reverse. Issues such as seniority, transfers, job posting and bidding rights tend to be common

to the entire craft or class, and if the craft or class does not reflect a rational basis of classification the result may have serious economic consequences.

That this is not a speculative result appears from the affidavit of C. P. Hutchens, who was the Director of Personnel for Capital Airlines prior to its merger into United. That affidavit described the serious impact on Capital resulting from a single collective bargaining agreement for the "clerical" craft or class made up of so many and diverse job classifications, including the cost of employee retraining and impairment of employee morale and efficiency as the result of transfers from and into classifications having no functional similarity (R. 103-5).

Aside from its impact on the conduct of United's business, this craft or class determination has obvious impact on United's right to freedom of contract. Here, for example, the craft or class determination poses the substantial probability that United will no longer be able to bargain separately with its ramp and stores employees—part of the craft or class established here—as it has with the IAM since 1948. For once a representative for the craft or class is selected, United will be under an obligation to bargain with that representative for that craft or class, and with no other representative for any of the employees in that craft or class. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 548 (1937).

B. The Constitutional Right.

United does not contend that these factors preclude the Board from imposing a craft or class upon it. But since United does have a substantial interest in the composition of the craft or class, the determination must be rationally made and United must be accorded procedural due process in the method by which it is made. Its concern in this ad-

ministrative decision is of no different order from the concern of a regulated party in administrative decisions establishing the rent he may charge his tenant, or the minimum wage he must pay his employees, or the rates he may charge for fire insurance. All of these interests are entitled to due process protection in the manner in which they are regulated. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (1941); *Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Jordan* v. *American Eagle Fire Insurance Co.*, 169 F. 2d 281 (C. A. D. C., 1948). See also *La Cross Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949).[5] Such regulation acts directly and through the force of federal sanction, unlike the indirect competitive effect complained of in cases such as *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940).

United, being "affected by the determination of an administrative body," is "entitled to insist" upon compliance "with the requirements of due process." *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 182 (1938).[5a]

5. In *La Cross* the interest of an employer in a bargaining unit determination was clearly recognized. The Court held that the power given employees under the Wisconsin act to designate their own collective bargaining units conflicted with the federal statute which left that issue to the National Labor Relations Board. The Court held that the certification "established legal rights and relationships," and "told the employer, subject to judicial review, with whom he could not refuse to negotiate without risk of sanctions." The Court held that the character of the certification was, therefore, reviewable at the instance of an employer even though the certification was enforceable only through another proceeding. 336 U. S. 18, 23-24.

5a. The determination considered in *Shields* was that of the Interstate Commerce Commission in finding that the respondent railroad was not an interurban electric railway. The consequence of this determination was that the railroad became subject to regulation under the Railway Labor Act, electric interurban railways being excepted from the coverage of that statute. The ICC was authorized to make such a determination, after hearing, upon application of the Mediation Board. The Court held that the ICC determination was within the agency's authority, and that the rail-

The constitutional interest of an employer in regulations affecting its labor relations has always been recognized by this Court, and in fact, has been assumed without question. Constitutional attacks in this area have been entertained and disposed of not on the ground that no constitutional right was involved but rather that the limitation imposed was not an unreasonable restraint on the employer's right to carry on its business. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570 (1930); *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 541, 557-8 (1937); *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 43-44 (1937).

That this constitutional interest includes the right to due process in bargaining unit determinations is established by *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146 (1941), a case arising under the Wagner Act prior to the 1947 Taft-Hartley amendments referred to in the Board's brief (NMB Brief, 50). There the employer objected on constitutional grounds to a decision of the National Labor Relations Board which included one of its plants in a larger collective bargaining unit which the NLRB had found appropriate after "extensive hearings." The basis of the employer attack was that the NLRB procedure denied due process of law, that there was no substantial evidence to justify the ruling, and that the authority granted the NLRB to make such determinations was an unconstitutional delegation of legislative power.

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road was not entitled to a trial *de novo* in the district court. In commenting on the Congressional requirement of a hearing, the Court stated: "And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." 305 U. S. 177, 182. The *Shields* case was distinguished in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 306-7 (1943), but *Switchmen's Union* reserved constitutional questions. See *infra*, pp. 44-6.

This Court gave full and serious consideration to every constitutional argument raised by the employer. It examined in detail the charges that the NLRB hearing deprived the employer of a "full and fair hearing as guaranteed by the Fifth Amendment" because of the refusal to admit certain tendered evidence (313 U. S. 146, 154-163), and concluded that the excluded evidence, even if admitted, could not have affected the outcome of the unit question. The Court, at the instance of the employer, examined the legislative standards imposed on the NLRB as a guide to its administrative action respecting unit determinations and found them to be adequate and not an unconstitutional delegation of legislative authority. The *Pittsburgh Plate Glass* case clearly established that an employer has an interest in fair procedures and adherence to constitutional standards in bargaining unit proceedings.

If the Congressional delegation in *Pittsburgh* had been to private parties—such as labor organizations or groups of employees—with no standards other than their voluntary act, then certainly serious doubt about the constitutionality of the statute would have been raised. This is precisely what the Board brief says Congress did under the Railway Labor Act. If the Board were correct in this view, we would suggest that the Railway Labor Act was to this extent invalid as an improper delegation of legislative power.[6] However, as we show below, the power to determine crafts or classes was not delegated to private parties under the Railway Labor Act.

Due process requires that United is entitled to a hearing at some point on the question of the appropriateness of the

6. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 318 (1936). The holding in *Carter*, that it was an unconstitutional delegation of legislative power to give mine operators and employees the right to establish maximum hours and minimum wages which then became binding with the force of law on other employers, has not been overruled despite the fate of other aspects of that decision.

scope of the unit of its employees for which it is required to bargain under threat of legal sanction, including the possible loss of its certificate of public convenience and necessity. There is no administrative enforcement procedure under the Railway Labor Act in which the requisite hearing could take place, as there is under the National Labor Relations Act. See *NLRB* v. *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712 (C. A. 10, 1964).[7] In *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943), this Court held that craft or class determinations of the Board were not subject to judicial review; hence due process cannot be satisfied through a subsequent judicial hearing as in *Bowles* v. *Willingham*, 321 U. S. 503, 519-21 (1944).[8] And if proceedings were started against United before the Civil Aeronautics Board under the Federal Aviation Act for failure to comply with the Railway Labor Act, United could not defend on the ground that its due process had been violated by the Mediation Board because the propriety of the designation of a bargaining representative by the Mediation Board is not open to question by the C. A. B. in such a proceeding. See *South-*

7. "The appropriateness of the bargaining unit is the salient issue in this unfair labor practice proceedings, and respondent [employer] is, to be sure, entitled to a due process hearing on that issue. And, if an opportunity for a full hearing on the critical issue was not afforded in the representation proceedings, respondent is entitled to be heard in this unfair labor practice proceedings." 330 F. 2d 712, 715. See also *Inland Empire Council* v. *Millis*, 325 U. S. 697, 710 (1945): "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

8. In *Bowles*, the delay of due process until after administrative action became effective was justified on the grounds of the exigencies of war. ". . . Where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires." 321 U. S. 503, 521.

ern Pilots Ass'n v. *C. A. B.*, 323 F. 2d 288, 290 (C. A. D. C., 1963), cert. den. 376 U. S. 954 (1964).[9]

Thus the only time and place at which United's right to procedural due process in the determination of the appropriate craft or class can be satisfied is before the Mediation Board in its proceedings under Section 2 Ninth of the Railway Labor Act. Consequently, the Board's position that United cannot become a party to such a proceeding is constitutionally in error.

If the Railway Labor Act compelled such a result it would to this extent be unconstitutional. But as we shall demonstrate in the next section of this argument, Congress did not intend that the craft or class issue would be delegated to labor organizations or could be arbitrarily determined by the Mediation Board.

II.

BY ACCEPTING WITHOUT INDEPENDENT INQUIRY THE BARGAINING UNIT AGREED UPON BY TWO UNIONS, THE MEDIATION BOARD FAILED TO EXERCISE THE DUTY IMPOSED UPON IT UNDER THE RAILWAY LABOR ACT.

A. The Statutory Plan.

The Railway Labor Act was substantially amended in 1934—the year before the passage of the Wagner Act—by the addition, *inter alia*, of the election procedures of Section 2 Ninth. 48 Stat. 1188.

9. For this reason, among others, United's action here is not premature, for once the Mediation Board proceeding is concluded United can resist only at the risk of jeopardizing its certificate of public convenience and necessity under the Federal Aviation Act. The prematurity argument, raised by the Board in the district court, has been abandoned here.

Section 2 Fourth of the Act provided, in part, that:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

Machinery for determining the representative of the craft or class is established in Section 2 Ninth, which does not further elaborate on the meaning of the phrase, but provides that upon certification of a representative by the Mediation Board, "the carrier shall treat with the representative so certified as the representative of the craft or class."

The amendments contain no definition of craft or class. Commissioner Eastman, their draftsman,[10] testified during the Congressional hearings that some thought had been given to this but he felt "there would be no difficulty in determining what is a craft or class of employees," and if there were any question it would be decided by the Mediation Board. Hearings on H. R. 7650, House Comm. on Interstate and Foreign Commerce. 73d Cong. 2d Sess. 1934, pp. 45, 57-58.

The following year, during consideration of the bill leading to the Wagner Act, the subject of bargaining unit determination was again raised. The Wagner Act provided specifically that the National Labor Relations Board was to make unit determinations. In commenting on this section of the bill, the House Report stated:

> "Section 9(b) provides that the [National Labor Relations] Board shall determine whether, in order to effectuate the policy of the bill (as expressed in Sec-

10. Commissioner Eastman's views have been accepted as authoritative. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 302 (1943).

tion 1), the unit appropriate for the purposes of collective bargaining shall be the craft unit, plant unit, employer unit, or other unit. The matter is obviously one for determination in each individual case, and the only possible workable arrangement is to authorize the impartial governmental agency, the Board, to make that determination. *There is a similar provision in the Railway Labor Act of 1934 (Sec. 2(9); 2(4)).*" H. Rep. No. 969 on H. R. 7978, 74th Cong. 1st Sess. 1935, p. 20. (Emphasis added.)

The Senate Report pointed out that employees could not choose their own bargaining units, since this determination had to precede a determination of what employees could participate in any kind of choice. And in this respect, the Railway Labor Act was considered to be similar to the National Labor Relations Act.

> "Obviously there can be no choice of representatives and no bargaining unless units for such purposes are first determined. *And employees themselves cannot choose these units,* because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.
>
> "This provision is similar to Section 2 of 1934 amendments to the Railway Labor Act (48 Stat. 1185), which states that—
>
> > " 'In the conduct of any election for the purpose herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election.' " S. Rep. No. 573 on S. 1958, 74th Cong. 1st Sess. 1935, p. 14. (Emphasis added.)

Thus the legislative history clearly establishes that it is the duty of the Mediation Board—not the right of employees—to establish crafts and classes. This duty was confirmed in *Switchmen's Union:* ". . . The authority of the Mediation Board in election disputes to interpret the meaning of 'craft' as used in the statute is no less clear

and no less essential to the performance of its duty." 320 U. S. 297, 305 (1943).

The government suggests in its brief that if employees agree on the craft or class this must be accepted, and in that circumstance the duty of the Mediation Board under Section 2 Ninth does not come into play unless there is disagreement as to the identity of the representative. (NMB Brief, 44.) This argument, interestingly enough, was first made by a carrier in a Mediation Board proceeding under Section 2 Ninth who saw that if this were so then it could not be compelled to treat with the representative for such a craft or class. For the carrier's duty to treat with a certified representative only arises under Section 2 Ninth of the Act, and if there is no dispute under that section then there can be no certification and hence no enforceable duty.

The Board rejected this ingenious argument:

> ". . . If the theory advanced by the carrier were adopted, the more nearly employees were unanimous in their choice of representatives the more powerless the Board would become to certify the fact of their choice. In order for the employees to secure representation rights in such a situation it would be necessary for them to artificially create a dispute by injecting another contender for representation to secure services of the Board and a certification. This clearly is contrary to the Act which was enacted to promote peaceful settlements not foment disputes." *Northwest Airlines, Case No. R-2107*, 2 NMB Determinations 19, 22-23 (1948).

In any event, the government's argument is irrelevant. Here there was no agreement among *employees* as to the craft or class, but agreement among *labor organizations*—which may or may not reflect the agreement of the employees. The Mediation Board recognizes the distinction. Thus if representation is being sought for the first time by a single labor organization, the Board does not assume

there is agreement among the employees because no other labor organization seeks representation rights, but assumes rather that "the dispute is between those who favor having a representative as opposed to those who are either indifferent or are opposed to having a representative for the purposes of the act." 29th NMB Annual Report (1963), p. 35.[11]

It is not surprising, therefore, that the government's brief does not draw the conclusion its argument implies; that since two labor organizations agreed on the craft or class the Mediation Board has no craft or class determination function under Section 2 Ninth.[12] Rather the government subsequently argues that the Mediation Board did in fact exercise its statutory duty to make a craft or class determination (NMB Brief, 60).

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11. Why the employees "opposed to having a representative" are not also parties to the dispute when more than one labor organization seeks representation rights—as do the IAM and the Brotherhood in this case—is not apparent. Yet the Board seems to draw this distinction and has expressly denied any rights to such employees in Nos. 138 and 369.

12. The government refers to the proviso to the definition of "employees" in Section 1 Fifth of the Railway Labor Act that no occupational classification by order of the ICC "shall be construed to define crafts or classes according to which railway employees may be organized by their voluntary action" in support of its argument (NMB Brief, 46). The purpose of the proviso was obviously to make possible the preservation of bargaining arrangements already entered into between labor organizations and carriers on a voluntary basis. The proviso implies no limitation on the power of the Board itself. This view is supported by the Board. "So far as possible the Board has followed the past practice of the employees in grouping themselves for representation purposes and of the carriers in making agreements with such representatives. But these practices have not always been uniform and claims are often made that the Railway Labor Act requires changes in existing practices." *Administration of the Railway Labor Act by the National Mediation Board, 1934-57* (1958), p. 20.

Neither Brotherhood, in its Brief in No. 138, nor the Railway Labor Executives Association, which filed an *amicus* brief in Nos. 138, 139 and 369, claims the right for employees which the government suggests, although Mr. George M. Harrison whose testimony is quoted by the government to this point (NMB Brief, 54-56) is now the chief executive officer of Brotherhood.

B. The Arbitrary Exercise of the Board's Duty.

The record clearly establishes that the Board conducted no investigation, held no hearing, accepted no evidence and made no findings respecting the appropriateness of the craft or class at United. It accepted the unit on which the two unions had drawn the battle lines and refused United's request for a hearing. The reasons for this denial were clearly and repeatedly stated by the Board: neither the IAM nor the Brotherhood "have made any request for a hearing on the question of craft or class," and "in the Board's opinion the carrier is not, and cannot be, a party to this representation dispute." (R. 99, 114; see also R. 65, 71, 85.)

This position simply confuses the issue of craft or class with the issue of the identity of the representative of that class once the unit is determined. The former is the Board's business—as the preceding section clearly shows. The selection of the representative for the designated unit is the business of a majority of the employees from which the employer is properly excluded. But excluding the employer from the selection of the representative does not warrant excluding him from the determination of the scope of the bargaining unit in which he has a substantial interest.

The distinction which the Board fails to draw here was clearly seen by it and the courts in the litigation arising out of the successful effort of the Air Line Pilots Association to extend its bargaining rights at United to include flight engineers as well as pilots. The flight engineers had been separately represented since 1949, and by the same union—Flight Engineers International Association—continuously since 1951. The Mediation Board acting through a committee appointed under Section 2 Ninth, held, after extensive hearings in which United participated, that the combined unit was appropriate and should be voted together on one ballot. *Case No. C-2946*, 3 NMB Deter-

minations 56 (1961). Since the pilots outnumbered the flight engineers by more than two to one, it was apparent that the Air Line Pilots Association would win the election with no difficulty. The Flight Engineers sought an injunction to prevent the holding of the election, on the ground, among others, that the Mediation Board had no authority to change the craft or class which the flight engineers themselves had organized and which had been recognized for over ten years.

The Court of Appeals, in affirming the dismissal of the complaint, agreed that the right of the employees extended only to the selection of the representative and not to the determination of the craft or class.

> "Under the Railway Labor Act only the NMB (or the committee designated by it) has the power to make craft or class determinations . . . The right given to employees is that of designating, by a majority of those comprising a 'craft or class,' their representatives." *UNA Chapter, FEIA* v. *National Mediation Board*, 294 F. 2d 905, 908 (C. A. D. C., 1961), cert. den. 368 U. S. 956 (1962).

The Mediation Board's view of its power and duty to make craft or class determinations on the basis of relevant evidence was clearly stated to this Court in the Board's brief in opposition to the Flight Engineers Association petition for a writ of certiorari in the *UNA Chapter* case:

> "On the merits, petitioner's objections are equally unavailing. In essence it claims that once a craft or class is recognized it may not change. Petitioner relies on the fact that it represented the flight engineers in past bargaining with the carrier. However, *Congress has charged the Board (or its Committee) with a duty to find the craft or class to be whatever it is, not what it used to be.* Where employees—such as pilots and flight engineers in this age of jets—change in function, duties, interests, skills and responsibilities

> as a result of technological development in the industry, *the Board must recognize the change.* Notwithstanding petitioner's assertions, the Board neither destroyed nor created a craft or class. Pursuant to the directive of Section 2, Ninth, of the Railway Labor Act, it made a finding that there is today an existing craft or class of flight deck crew members." (Brief in Opposition of National Mediation Board, Supreme Court No. 531, October Term, 1961, pp. 13-14. Emphasis added).

Nothing in the Railway Labor Act or in the Board's statement to this Court of its duty under the Act justifies the failure of the Board to make a rational determination of the craft or class here solely because two competing labor organizations agreed on how to split up United's employees. It may well have been that if the Board had heard United's evidence concerning the impact of electronic computers on reservations systems, record keeping and billing and the resulting "change in functions, duties, interests, skills and responsibilities" of its employees, it might have found another craft or class appropriate despite the agreement of the IAM and the Brotherhood. As the Board has elsewhere acknowledged, ". . . In the Board's investigation of such matters under Section 2, Ninth of the Act, it must rely on the carrier for information needed in considering the dispute." *Eastern Air Lines,* NMB Case No. R-3639, p. 3, December 5, 1963.

The government suggests in its brief that the Board did exercise its power by its "decision to adhere to the craft lines drawn in 1947." (NMB Brief, 60). Even if that were true, decision on that ground would fly in the face of the Board's statement to this Court in the *UNA Chapter* case that Congress charged it "with a duty to find the craft or class to be whatever it is, not what it used to be." As we have shown, *supra,* pp. 4-6, the Board has not followed R-1706 blindly in other cases in which it has heard evidence of the circumstances at the carrier involved, and

has refused to follow that classification as recently as December 1963 in the *Eastern Air Lines* case. The Board has attempted to explain its deviation from R-1706 on the grounds of "unique circumstances" in these other cases (R. 118). Perhaps if the Board had held a craft or class hearing in this case it might have discovered that here, too, the circumstances were "unique."

The fact is the Board did not rely on R-1706 in this case. Affidavits in this proceeding demonstrate that the Board was prepared to accept a different craft or class if the two labor organizations had agreed to a different unit. Included as an exhibit to one of these affidavits is a letter from the IAM to the Brotherhood, sent after the latter amended its application to include employees then represented by the IAM. In this letter the IAM commented on the possibility of the craft or class being again amended to exclude the IAM-represented employees. The letter states:

> "After discussing this matter further with the National Mediation Board, we were assured that if an agreement could be reached between your Organization and our Organization, which would exclude all employees in the craft or class presently represented by our Organization, the Board would conduct an election among the remaining employees in the craft or class without establishing a precedent that could be used by any other organization on any other property." (R. 139.)

The affidavit of Board Member O'Neill filed in opposition to this affidavit concedes that a discussion did take place between Mr. O'Neill and the writer of the IAM letter, and states that he advised the IAM representative that if the two unions agreed to exclude the ramp and stores employees from the craft or class, "the Board would give consideration to that situation . . ." (R. 142.)

Mr. O'Neill's affidavit is a frank admission that the Board was prepared to act on the basis of any agreement between the two unions, without regard to R-1706 or to the exercise of its own judgment and certainly without regard to any objective criteria.

The complaint alleged that the determination was arbitrarily and capriciously made without any hearing and without consideration of its effect on United. The record clearly supports the conclusion that the Board simply accepted the grouping agreed upon by the two unions and made no independent inquiry or determination.

This Court has elsewhere commented upon administrative determinations arbitrarily and capriciously made:

> "The Executive Order contains no express or implied attempt to confer power on anyone to act arbitrarily or capriciously—even assuming a constitutional power to do so . . . An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination.' It is implicit in a government of laws and not of men." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 136 (1951).

C. Carrier Participation in Prior Representation Proceedings.

The government contends that since 1935 the Board has consistently construed the 1934 amendments to the Railway Labor Act as precluding carrier participation in representation proceedings, and urges this as a reason for supporting the Board's position here (NMB Brief, 57-58).

The fact is we know of no other major airline case in which the Board has not permitted carrier participation in craft or class proceedings. Carriers have participated in ten of the eleven airline craft or class determinations re-

ported in the last published volume of the Determinations of Craft or Class of the National Mediation Board. See 3 NMB Determinations 1, 9, 16, 20, 31, 35, 49, 56, 87, 94. In the one instance in which no carrier participation is indicated, it was stipulated that the result would be the same as that in a companion case in which the carrier did participate. 3 NMB Determinations 6.

In four of these cases, the only participants in the hearing were the carrier and a single labor organization. *American Airlines, File No. C-2380*, 3 NMB Determinations 20 (1955); *American Airlines, File No. C-2783*, 3 NMB Determinations 49 (1959); *Northeast Airlines, Case No. R-3445*, 3 NMB Determinations 87 (1960); *Trans-World Airlines, Case No. R-3479*, 3 NMB Determinations 94 (1961).

The determinative evidence in many of these craft or class hearings was furnished by the carrier. See for example, *United Air Lines, File No. C-2139*, 3 NMB Determinations 9, 11 (1953).

The distinction between the craft or class issue and the selection of the representative for the craft or class has been recognized by the Board in craft or class determinations in which the carrier has participated.

In *Trans-Texas Airways and North Central Airlines, File Nos. C-2252 and C-2389*, 3 NMB Determinations 16 (1956), the International Association of Machinists invoked the services of the Board to investigate a dispute among the stock and storeroom employees of the two carriers. The Air Line Agents Association "took the position that the applications of the IAM should not be docketed unless the Board has determined that stock and storeroom employees are a separate craft or class for representation purposes under the Railway Labor Act." The Board thereupon held a hearing on the craft or class issue—a hearing in which both carriers participated—and only after

concluding that the stock and storeroom employees constituted an appropriate craft or class of employees of the two carriers did the Board direct that the applications of the IAM would be docketed.

In *Northeast Airlines, Inc., Case R-3445*, 3 NMB Determinations 87 (1960), the airline protested job titles listed in the labor organization's application "and requested a hearing on the subject of this application." The labor organization also requested a hearing. A hearing was held at which "both the Carrier and [the union] were represented by counsel, were given full opportunity to be heard, to examine and cross-examine witnesses, and both filed briefs in support of their respective positions." (p. 88.) After the Board made specific findings respecting the various contested classifications, the application was docketed. Here again, the craft or class dispute and the representation question were separated and the carrier was heard on the former.

An earlier Board case involving the clerical craft or class presents an ironical note in light of the Board's position in this case. In *KLM, File No. C-2098*, 3 NMB Determinations 1 (1953), the Transport Workers Union of America (TWU) invoked the Board's services to investigate a representation dispute among what it described as the "operating clerical employees of KLM Royal Dutch Airlines." A hearing was held on the appropriateness of the requested craft or class at which the carrier and other labor organizations appeared and opposed the TWU. The Board, in dismissing the application, held that the TWU had not presented any evidence in support of its position. The Board cited from the brief of KLM:

> "As well stated in the brief filed on behalf of KLM, 'it is a fundamental principle of administrative law that decisions of administrative tribunals must be based upon evidence in the transcript of the proceedings before them.'" at p. 4.

Although the Board continues to give lip service to its view that a carrier cannot be a party in a representation proceeding, it nonetheless accepts the carrier as a *de facto* party since the carrier peculiarly possesses the knowledge needed to determine the craft or class issues. Thus in the *Eastern Air Lines* case, No. R. 3639, p. 3, December 5, 1963, the Board stated:

> "Eastern Air Lines, that [sic] carrier here involved, contends for a grouping of employees contrary to either of the contesting unions. It should be observed that under the Railway Labor Act, a carrier is not a party in representation disputes. However, in the Board's investigation of such matters under Section 2, Ninth, of the Act, it must rely on the carrier for information needed in considering the dispute. Accordingly, *the views of the carrier on matters of this nature have been received and taken into account.*" (Emphasis added.)

Thus the government's assertion of a consistent Board construction of the Railway Labor Act as precluding carrier participation in proceedings under Section 2 Ninth is simply not supported by Board practice, which has consistently, except for this case, been to the contrary.[13]

D. Conclusion.

The Railway Labor Act—like the National Labor Relations Act—imposes the power and duty on the administrative agency to determine craft or class or bargaining unit questions. Although the Railway Labor Act does not

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13. The Mediation Board, through a committee designated under Section 2 Ninth, is currently conducting a hearing relating to the composition of the mechanics craft or class of employees at United, Eastern Air Lines and Seaboard World Airline. The three carriers are participating in the hearing and the committee has requested the carriers to be the first parties to present evidence. The hearing was convened on December 4, 1964, and formal presentation is scheduled to start on January 7, 1965. NMB Case Nos. R-3712, 3713, 3714.

specifically require a hearing, it does require an "investigation" and designation by the Mediation Board of the employees entitled to participate in the election. Employers under the National Labor Relations Act—under statutory provisions held to be analogous to those of the Railway Labor Act[14]—have always been accorded the right to be heard on bargaining unit determinations and this right has been accorded due process protection. *NLRB* v. *Ideal Laundry & Dry Cleaning Co.*, 330 F. 2d 712 (C. A. 10, 1964). See also *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146 (1941).

Employees and labor organizations have no greater rights under the Railway Labor Act respecting the craft or class question than does the carrier. The Mediation Board has in fact recognized the carrier interest in this issue by permitting full carrier participation in numerous administrative hearings on craft or class determinations. There is no statutory or constitutional basis for refusing to hold such a hearing in this case solely because two labor organizations have agreed on the craft or class.

III.

THE SWITCHMEN'S UNION CASE IS NO BAR TO REQUIRING THE MEDIATION BOARD TO PROVIDE A FAIR PROCEDURE.

The government contends that the "decision" of the Mediation Board to adhere to its 1947 craft or class determination is not reviewable under the doctrine of *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943) (NMB Brief, 60).

As we have shown, the Board made no such "decision," and if it had, such a decision would not be consistent with

14. *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 44 (1937).

the duty as the Board itself sees it to "find the craft or class to be what it is, not what it used to be."

Since United does not seek review of the merits of the Board's determination but only that the Board be required to make that determination on the basis of evidence and in accordance with the requirements of the statute and of procedural due process, the reliance on *Switchmen's* is misplaced. *Switchmen's* involved no such questions.

Clearly, *Switchmen's* did not foreclose review of constitutional questions, nor did it insulate the Board from judicial inquiry as to whether it was exercising the duty imposed on it by the Railway Labor Act.

Switchmen's was initiated by a labor union which protested a determination made after hearing by the Board that a craft or class had to be system-wide and include all employees of the carrier in the classification. The Court noted that there was no provision for review of craft or class determinations under the Railway Labor Act, and reasoned that since Congress had created the "right" of majority representation, "*all constitutional questions aside,* it is for Congress to determine how the rights which it creates shall be enforced." 320 U. S. at 301. (Emphasis added.)

The origin of the right asserted by the labor union in *Switchmen's* is not the same as that asserted by United here. "The privilege of becoming an 'exclusive bargaining' agent . . . is a creature of Congress to whose grant Congress was therefore free to attach such conditions as it saw fit." *Fay* v. *Douds,* 172 F. 2d 720, 724 (C. A. 2, 1949). United's right, however, was not created by Congress, but rather was limited by Congress. Hence even if this case sought judicial review of the merits of the Board's craft or class determination it would not be barred by

Switchmen's. This case raises the constitutional question to which *Switchmen's* does not apply.[15]

As a preliminary step to its holding that Board craft or class determinations are not reviewable, the Court held in *Switchmen's* that Congress had imposed on the Board the duty to make such determinations. That the Court did not intend to foreclose all judicial examination of the exercise of this duty is apparent from a footnote comment in *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 336 n. 12 (1943), decided the same day:

> "Whether judicial power may ever be exerted to require the Mediation Board to exercise the 'duty' imposed upon it under § 2, Ninth and, if so, the type or types of situations in which it may be invoked present questions not involved here."

The instant case involves the Board's obligation under the Constitution and the statute to utilize fair procedure in making the craft or class determination. *Switchmen's* is no bar to review of the Board's failure to exercise this duty.

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15. Alleged constitutional defects in Board proceedings have been consistently reviewed. *UNA Chapter, FEIA* v. *National Mediation Board*, 294 F. 2d 905 (C. A. D. C., 1961), cert. den. 368 U. S. 956 (1962); *Air Line Stewards and Stewardesses Ass'n* v. *National Mediation Board*, 294 F. 2d 910 (C. A. D. C., 1961), cert. den. 369 U. S. 810 (1962); *WES Chapter, FEIA* v. *National Mediation Board*, 314 F. 2d 234 (C. A. D. C., 1962). Although the action of the Board was upheld in each of these cases, the court recognized that the Board was not exempt from constitutional limitations of due process. In the *WES Chapter* case it was charged that the Board deprived the appellant union of due process in not fully investigating charges that a rival union was employer dominated. The Board had held a hearing on the charges, but declined to compel the attendance of certain witnesses. The Court held that "Due process of law would not appear to require more in the circumstances than was accorded appellant." 314 F. 2d 234, 238.

IV.

THE FORM OF THE BOARD BALLOT CONTRAVENES THE EXPRESS PROVISION OF THE RAILWAY LABOR ACT THAT A MAJORITY OF THE EMPLOYEES SHALL HAVE THE RIGHT TO DETERMINE THE REPRESENTATIVE OF THE CRAFT OR CLASS.

In *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937), an employer challenged the validity of a Mediation Board certification of a union as the representative of the blacksmith craft or class because the union did not receive a majority of all eligible votes, but only a majority of those participating in the election. The carrier relied on Section 2 Fourth of the Railway Labor Act—the source of the employees' right to select a representative—which provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

In upholding the validity of the certification, the Court stated:

> "Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. [citations.] *Those who do not participate 'are presumed to assent to the expressed will of the majority of those voting.'* . . ." 300 U. S. 515, 560. Emphasis added.[16]

16. The cited cases all related to elections on bond or other financing propositions—elections in which the choice was either "yes" or "no." It is significant that the Court did not cite elections involving public office where somebody must be elected and the voter is given a choice only among alternative candidates. In the Court of Appeals the Brotherhood (petitioner in No. 138) contended that a representative has to be designated in a Mediation Board election, just as a governor or president has to be elected. This argument is not urged by the Brotherhood here.

The *Virginian* case was decided in March 1937. In July 1937, the National Labor Relations Board began to provide space on its ballots for a "no" vote. Second NLRB Annual Report (1937), p. 114 n. 16. This policy of the NLRB was attacked in *Interlake Corp.*, 4 NLRB 55 (1937). A union there contended that allowing employees to vote for no representation "was placing too much emphasis on the rights of a minority." The union also argued that employees desiring no representation could simply refrain from voting.

The NLRB responded by stating that the Wagner Act did not require an unwilling majority to bargain through representatives but rather guaranteed the right of a majority if it chose to exercise it.

> "The policy adopted by the Board [NLRB] is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives."

With respect to the union's contention that the unwilling employee could simply not vote, the Board answered:

> ". . . Those not voting would be presumed to acquiesce in the choice of the majority who do vote, and thus the employee who does not desire to be represented by either designated union would not express this preference by refraining from voting." 4 NLRB 55, 61.

Since that time the National Labor Relations Board has consistently provided a space on its ballot for employees to vote for no representation.[17] Although Section 9(a) of the

17. Prior to the 1937 change by the National Labor Relations Board in the form of its ballot, it certified only a union receiving the vote of a majority of those eligible to participate. *First NLRB Annual Report* (1936), p. 108. For a brief period after it was created, the Mediation Board followed the same policy. *Administration of the Railway Labor Act by the National Mediation Board, 1934-1957* (1958), p. 16. Under such a policy, non-voting was an effective expression of a desire for no representation since non-

Wagner Act, which provided the right of the majority to vote for a collective bargaining representative, was modeled after Section 2 Fourth of the Railway Labor Act,[18] the National Mediation Board has consistently refused to allow an employee to vote for no representation.

Section 9(a) of the Wagner Act was readopted by Congress in 1947 as part of the Taft-Hartley amendments (61 Stat. 143), but Congress has had no occasion to look at Section 2 Fourth of the Railway Labor Act since 1934.[19]

The difference in treatment under the two statutes is not explicable on the ground of a difference in their purposes. The government says that Section 2 Ninth of the Railway Labor Act "reflects a Congressional policy of encouraging the development of collective bargaining." (NMB Brief, 33.) But the policy of the Wagner Act was expressly stated to be the "encouraging [of] the practice and procedure of collective bargaining." Section 1, 49 Stat. 449.

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voting did not affect the size of the absolute majority of all eligibles which was needed for certification. This policy was changed by both Boards in recognition of the fact that eligibles may have failed to vote out of indifference as well as a desire for no representation. But while the NLRB recognized that this change required a place for a "no" vote, the Mediation Board continued its practice of allowing a choice only among alternative representatives.

18. See Majority Vote under the Railway Labor Act, Opinion of Attorney General Tom C. Clark, 40 Op. A. G. 541, 543 (1947).

19. The government's brief refers to the 1947 amendment of Section 7 of the Wagner Act to provide that employees had the right to refrain from as well as engage in protected activities (NMB Brief, 36). The right to refrain from the exercise of the rights contained in Section 7 was implicit in the Wagner Act and was specifically added in 1947 to correlate with the addition of prohibitions against coercive acts of unions against employees—a provision not found in the original Wagner Act. Sec. 8(b)(1), 29 U. S. C. § 158, 61 Stat. 141. See Analysis by Senator Taft, 93 Cong. Rec. 7001 (1947). The Section 7 amendment had no application to the election of representatives by the majority of the employees provided in Section 9(a), which section was simply readopted in relevant part in the same language in which it appeared in the Wagner Act. Sections 7 and 9(a) of the Wagner and Taft-Hartley Acts are set out in the Appendix to this brief.

When the Mediation Board practice of not permitting an employee to vote against representation was challenged in this litigation, the Board responded that an employee under the Railway Labor Act had the duty—not merely the right—to designate a bargaining representative (R. Nos. 138 and 369, 144-45). The Board contended that there was a "mandate of Congress that representatives be designated." (R. 86.)

The legislative history of the 1934 Railway Labor Act Amendments does not support this view.

Commissioner Eastman testified that the bill—

> "does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be." (Hearings on H. R. 7650, House Comm. on Interstate and Foreign Commerce, 73rd Cong. 2d Sess. 1934, p. 57.)

Senator Wagner, in response to a criticism of an industry witness that the amendments would have the effect of compelling employees to join unions, stated:

> "I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not join any union or to remain unorganized." (Hearings on S. 3266, Sen. Comm. on Interstate Commerce, 73rd Cong. 2d Sess. 1934, p. 76.)

The government now acknowledges that employees have no duty to select a representative, and that its assertions to this effect in the district court do not reflect its current views (NMB Brief, 32, 33 n. 9).

Instead, the government now argues that not voting is the "equivalent of a vote against representation," and that an employee desiring no representation can therefore express

his will by simply not voting (NMB Brief, 30-32). The only ground for criticism of the form of ballot has now been removed, claims the government, by the recent Mediation Board change which adds to the face of the ballot the advice that "no employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be elected." (NMB Brief, 30, 64.)[20]

But not voting is simply not the equivalent of voting "no."

That a majority of eligible voters may not participate and hence may thereby frustrate the selection of a bargaining representative does not insure the converse of the proposition: that the bargaining agent selected does in fact represent the desires of a majority of the employees. A simple example illustrates that the results of an election may differ substantially depending on the form of ballot.

Assume a craft or class of 13 employees, 6 of whom desire no representation, 4 desire Union A and *no other*, and 3 desire Union B and *no other*. The fact that an employee may prefer no representation rather than representation by a union to which he has been opposed in a hotly contested campaign is neither unrealistic nor unusual.

Under the new Mediation Board form of ballot, as well as the old, the 6 who desire no representation can manifest this

20. The government argues that for over 30 years and in over 3400 elections the Mediation Board has used a form of ballot which did not provide a space for a "no" vote, and that this practice is entitled to great weight as an exercise of "expert judgment," which has been unquestioned by Congress (NMB Brief, 25-30). But for these same 30 years the ballot failed to advise employees that they were not required to vote, or what percentage of total votes would constitute a valid election. This "old ballot was unfair," in the opinion of the Solicitor General, and for that reason the Mediation Board placed on it the above quoted legend effective November 23, 1964 (NMB Brief, 30, 63-65). This hardly spells out a very persuasive case for administrative expertise. In any event, whatever consistent practice there had been for 30 years certainly came to an end on November 23, 1964.

desire only by not participating in the election. The remaining 7 employees will then cast 4 valid ballots for Union A and 3 valid ballots for Union B. Since 7 employees—or a majority of the 13—have participated in the election, the election is valid under the Board's procedures. A majority of those participating, or 4, will then determine the representative. Hence Union A will be the representative for all 13 employees, although it was the choice of only 4.

If under the same circumstances the National Labor Relations Board were to conduct the election the results would be different. The 6 employees who wanted no representation could cast valid ballots for "no union;" 4 would vote for Union A and 3 for Union B. Since no choice would have a majority of the total votes cast, under run-off procedures, Union B, having the lowest number of votes, would be dropped and a run-off election would be held between the choices of Union A and "no union." Now the 6 employees would be joined by the 3 who voted for Union B and preferred no representation rather than Union A, and the vote would be the same 4 for Union A and 9 for "no union."[21]

The government's answer to this example—which was set out in United's complaint (R. 7)—and a similar one used by Judge Youngdahl in his opinion (R. Nos. 138

21. The run-off procedures of the National Labor Relations Board have varied, as the government states (NMB Brief, 30 n.8). However, at all times since the "no" has appeared on the NLRB ballot, the "no" choice would appear on the run-off ballot if it received a plurality of the votes cast. The Mediation Board run-off rules provide that the two highest choices will appear on the run-off ballot (29th NMB Annual Report (1963), p. 36). The Mediation Board does not tell us here whether it would allow a "no" choice to appear on a run-off ballot if a majority participated in the election, but the number not participating exceeded the number voting for any one choice—as in the example cited above. Such a run-off should be allowed if not voting is "treated as the equivalent of a vote against representation." (NMB Brief, 30.)

and 369, 152), is that the example argues conclusions from facts. An equally valid assumption might be made, suggests the government, that the supporters of Union B might prefer Union A to no union (NMB Brief, 30 n.8).

But this answer pinpoints the vice in the Board's failure to allow a chance for a "no" vote to be cast. There is no possible way of knowing whether the non-voters were motivated by indifference or by a desire to have no representation; and neither is it possible to know how those who voted for Union B would vote in a run-off between Union A and no union.

The fact is that unless a representative receives an absolute majority of the total eligible to vote there is no valid conclusion that can be drawn from the Board's election. We do not argue that a representative must get such a vote for the election to meet the statutory requirement that the representative be determined by a majority of the employees. We would not even contend that an election is invalid simply because a majority of those eligible to vote did not participate. We do say that unless the choice of casting a valid ballot against representation is available then no valid conclusions can be drawn about the desires or presumed desires of a majority of the employees.[22]

The result of the Board's position is a perfect paradox: the certification of a union receiving less than a majority of the number eligible to vote is justified on the ground that

22. Significantly, in the only judicial examination of the Mediation Board's form of ballot prior to this litigation, the district court for the Northern District of New York held, in *McNulty* v. *National Mediation Board*, 18 F. Supp. 494 (N. D. N. Y., 1936), that the Mediation Board's failure to provide space in its ballot for a "no" union vote precluded a clear expression of majority will and that, therefore, a certification resulting from an election based upon that form of ballot was not entitled to judicial enforcement. The Board does not consider the *McNulty* case as binding on it since it was not a party to the suit (R. 86-87).

the non-voter is presumed to assent to the will of the majority of the voters (*Virginian Railway* case, 300 U. S. 515, 560); yet the employee who wants no representation is told the only way he can manifest that desire is by not voting; but under the initial presumption, by not voting he binds himself to the choice of the majority of those who do vote for representation.

If the Mediation Board really means that not voting is the equivalent of voting "no", then the question put by Judge Youngdahl to government counsel should be answered: "If you say that it is the same, why aren't you willing to agree to it?" (R. Nos. 138 and 369, 144.)

It is not the same. The Board practice does not meet the requirements of Section 2 Fourth of the Railway Labor Act that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." This statutory command is no less explicit than the requirement of the National Labor Relations Act that professional employees shall not be included in a unit with nonprofessionals "unless a majority of such professional employees vote for inclusion in such unit." NLRA Sec. 9(b)(1), 29 U. S. C. § 159. The practice of the Mediation Board here in not allowing a true expression of the desires of a majority of the employees in the craft or class is of no different order than that of the NLRA—condemned in *Leedom* v. *Kyne*, 358 U. S. 184 (1958)—in not allowing a separate vote among the professional employees.

The Railway Labor Act imposes on United "the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 548 (1937.) The Mediation Board practice enlarges upon this limited

duty and increases United's obligation without statutory warrant. Thus if the ballot question were not otherwise before this Court in this consolidated proceeding, United nonetheless would be entitled to be heard on this question.

CONCLUSION.

United does not challenge the power of Congress to regulate its labor relations, or the power of the National Mediation Board to make craft or class determinations. We are not seeking a review of the merits of a craft or class determination on this litigation.

Rather our plea is that the Mediation Board be held to some objective standards of conduct in its regulation of an employer's labor relations. For certainly basic property interests are affected by the manner in which an employer must deal with its employees under compulsion of legal sanction, including possible loss of its license to do business. The Board should not be permitted to hide behind *Switchmen's Union* to justify such unpredictable and inconsistent action as this record discloses. Here the Board says that employees have the right to select their own crafts or classes; when faced with this claim in the *UNA Chapter, FEIA* litigation, the Board argued that it was *its duty* to make this determination—not the right of the employees. In this case the Board says it relied on a 1947 determination in adhering to the same craft or class; yet in prior cases the Board has said the 1947 determination needed re-examination and, in fact, on re-examination refused to follow it. It now says that was because of unique circumstances in the other cases, yet it has refused to hold any kind of hearing in this case to determine whether the imposing of the largest single bargaining unit in the history of the air line industry will not also present unique circumstances. And despite its claimed reliance on the 1947

determination, the record discloses that the Board was ready to accept another craft or class if the labor organizations agreed to that. The Board says it consistently has interpreted the Railway Labor Act as precluding employer participation in a craft or class determination; yet the Board practice has been precisely the contrary. It contends that its form of ballot has been used for thirty years in over 3400 elections; yet after certiorari was granted in this case, the Board changed that form, admitting now that its prior form had been "unfair," and then claims here its "expert judgment" should not be disturbed. But the change it made does not reach the primary defect of the ballot in not allowing the election to reflect a true expression of the desires of the affected employees.

Switchmen's Union cannot be read as immunizing the Board from any kind of accounting for this erratic behavior. Perhaps if the Board were required to allow participation in craft or class determination as a matter of right and not unpredictable sufferance to all affected parties —not only to labor organizations seeking representation rights—then some reasoned consideration of these issues might develop.

For the foregoing reasons, we respectfully request that the Court find that a carrier has the right to be heard before the National Mediation Board on the question of the appropriate craft or class of its employees just as an employer regulated by the National Labor Relations Act has a right to be heard on the question of an appropriate bargaining unit; that the National Mediation Board may not determine craft or class questions arbitrarily and capriciously; and that the form of ballot to be used in Board elections be such as to reasonably reflect the desires of a majority of the employees in the craft or class.

The judgment of the Court of Appeals should therefore be reversed in No. 139 and affirmed in Nos. 138 and 369.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Provisions Involved.

U. S. Constitution, Amend. V:

> ". . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Railway Labor Act:

Section 2 Fourth, 48 Stat. 1187, 45 U. S. C. § 152 Fourth:

> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions. *Provided*, That nothing in this Act shall be construed to

prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2 Ninth, 48 Stat. 1188, 45 U. S. C. § 152 Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordnace with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Wagner Act:

Section 7, 49 Stat. 452:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 9(a), 49 Stat. 453:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

Taft-Hartley Act:

Section 7, 61 Stat. 140:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 9(a), 61 Stat. 143:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in

such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."